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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner*
v.
NATIONAL LABOR RELATIONS BOARD AND THE BOEING COMPANY — No. 71-1417

NATIONAL LABOR RELATIONS BOARD, *Petitioner*
v.
THE BOEING COMPANY, AND BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO — No. 71-1607

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

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REPLY BRIEF FOR BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

I. THE RESIGNATION ISSUE

1. *Waiver*: The Board's argument on brief on the resignation issue reduces to a swift syllogism: (a) waiver of a statutory right must be clear and unmis-

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takable; (b) the Union's rule against strikebreaking bars a resigner's postresignation return to work by implication rather than expressly; (c) it therefore does not manifest a clear and unmistakable relinquishment of a statutory right; (d) it is consequently unavailable to the Union to defend against its imposition of a court-collectible fine for strikebreaking (Bd. br. p. 11).

One prime flaw in the argument is that it assumes the premise on which the syllogism rests. It presupposes the existence of a statutory right. Yet the issue to be decided—which the Board still refuses to confront (Bd. br. p. 10 and n. 10)—is whether a union member does have a statutory right to return to work in an existing strike subsequent to his resignation, without incurring the liability of a court-collectible fine, despite a union rule barring such postresignation strikebreaking. *Granite State* decided that a postresignation return-to-work was statutorily protected against the discipline of a court-collectible fine where *no* limiting union rule existed. This case presents the question whether there is a statutory right to return to work subsequent to resignation, free of the discipline of a court-collectible fine, where a union rule barring postresignation strikebreaking does exist. That question must first be answered before any notion of "waiver" can properly enter the analysis. If there is no statutory right, there is nothing to waive. Nothing exists from which to subtract. Only if a statutory right is first found is it relevant to consider waiver of it.

We have shown that a union member does not have a statutory right to return to work in an existing strike subsequent to his resignation, free of the liability of

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court-collectible fine, in the face of a union rule barring postresignation strikebreaking (our brief pp. 84-0). The Board does not address our argument. Indeed, it does not even speak of a statutory right, preferring the waffling invocation of "statutory policy . . ." (Bd. br. p. 11). And it explicitly disclaims a position on a union rule "expressly" limiting postresignation strikebreaking (Bd. br. p. 10 and n. 10), confining itself to a union rule which bars postresignation strikebreaking "by implication . . ." (Bd. br. p. 11). And it would invalidate an implied rule, solely because it is implied, on the ground that there may be no implied waiver of a statutory right. Yet its assertion of a statutory right rests on *ipse dixit* alone, and it studiously avoids meeting our argument that no statutory right exists.

It is time for the Board to stop playing Hamlet without Hamlet. This case cannot be sensibly analyzed without answering the underlying question whether a union member has a statutory right to return to work in an existing strike subsequent to resignation, without incurring the liability of a court-collectible fine, where a union rule bars postresignation strikebreaking. Only after it is first determined whether a statutory right does or does not exist can it be intelligibly ascertained what difference it makes, if any, that the rule is express or implied. To assert that a statutory right is abridged because the rule is implied is either question-begging or circular.

2. *Contract of adhesion*: The Board on brief asserts that a union constitution is a " 'contract of adhesion,' " that doubt as to the prohibitory reach of its terms should therefore be resolved against the union as the

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drafter of the document, and that a union constitutional ban against strikebreaking should accordingly not be interpreted to bar a postresignation return-to-work "by implication" (Bd. br. pp. 11-12). This is a wholly artificial construct which does not withstand any analysis.

(a) The relationship of a member to his union is like that of a citizen to his government, not of a policyholder to an insurance company. The constitution governing the union community, like that governing the body politic, must be ungrudgingly interpreted to achieve the ends for which the members formed their union, not as if it were some lifeless trust indenture. The member and his union are not antithetical; the members are the union; the union is not the enemy. And no individual need subject himself to the obligations of union membership—the duties that the members have chosen to undertake towards each other in furtherance of their common endeavor—unless that is his wish.

(b) We begin with the voluntary undertaking of union obligations.

(*i*) In this case, under the terms of the agreement between the Union and Boeing, every nonmember had "the right to elect to become a member of the Union or to elect not to become a member of the Union . . ." (A. 156). A nonmember was informed that "[m]embership in the Union is a matter of your own free choice . . ." (A. 188). Accordingly, every employee who became a member did so because he wanted union membership.

(*ii*) But even if an agreement between a union and an employer were to require membership of all the

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mployees within the unit, compulsory membership neans only that the employee is obligated to pay union ues and an initiation fee (our brief pp. 34-35, 38, 6). An agreement can commit an employee solely to uch payments. He need not assume any other union bligation. When he chooses to become a full member, ndertaking by that act to enjoy the totality of union enefits and to assume the whole of union obligations, e does so because that is what he wants to do. He is ree to acquire or to forego full union membership as e wishes.

(*iii*) The element of constraint is highly limited ven as to the payment of union dues and initiation ees under an agreement between a union and an em-loyer which requires it. Experience has demonstrated verwhelmingly that employees who choose to be repre-ented by a union also voluntarily pay dues and fees to . When the 1947 amendments to the National Labor elations Act were adopted, the proviso to Section (a)(3) was amended to provide that a union security greement, obligating the employees covered by the greement to pay union dues and initiation fees, could nly be valid "if, following the most recent election eld as provided in Section 9(e) the Board shall have rtified that at least a majority of the employees igible to vote in such election have voted to authorize uch labor organization to make such an agreement ." This requirement was repealed on October 22, 51 (Public Law 189, 82d Cong., 1st Sess.), it having oved "burdensome and unnecessary." *N.L.R.B.* v. *aynor News Co.*, 197 F.2d 719, 724 (C.A. 2, 1952), firmed, 347 U.S. 17 (1954). Its pointlessness was anifest from the results of the union-shop authoriza-on polls conducted by the Board. "During the 4 years

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and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board conducted 46,119 such polls. Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97 percent of those conducted." [1] For the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop.[2] The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the unionship;[3] in 1949, of 1,471,092 valid votes, 93.9% favored the union shop;[4] in 1948, of 1,629,330 valid votes, 94.2% favored the union shop.[5]

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements should have forever put the quietus to the notion that dues and fees are unwillingly paid. These agreements operate compulsively only as to that small group known as " 'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union. . . ." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 41 (1954). Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation

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[1] 16 NLRB Ann. Rep. 10 (1951).

[2] *Id.* at 306.

[3] 15 NLRB Ann. Rep. 235 (1950).

[4] 14 NLRB Ann. Rep. 172 (1949).

[5] 13 NLRB Ann. Rep. 111 (1948).

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to pay. Actual constraint is thus minimal even in the limited area where it may be lawfully exerted.

(*iv*) Acquisition of full union membership, and the consequent assumption of all union obligations, is therefore the free act of the employee, and even the payment of dues and fees under a union security agreement is in its essence voluntary. Of course any particular employee may join a union for one or more of a wide variety of reasons—self-interest, conviction, tradition, social suasion, accident. But, given his status as a full member, his motivation for acquiring full membership is irrelevant to his obligation to discharge the obligations which go along with it, as this Court explained in *Allis-Chalmers* (388 U.S. at 196):

> The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F.2d, at 660. But the relevant inquiry here is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the union's picket line. It is clear that the fined employees involved in these cases enjoyed full union membership . . . . Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary.

(*c*) Accordingly, if what the Board on brief means by a contract of adhesion is that employees have no alternative but to join the union, this is simply not so. An employee who is a full member has acquired that

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status because he elected it. But the Board may mean by a contract of adhesion that an employee who chooses to become a full member must take the union constitution as it exists. That is true, but only in the same sense that a person who moves into a new city or state must take the laws of those communities as they exist. This is inherent in the nature of acquiring membership in any existing, ongoing and self-governing institution. Analysis must therefore be much more discriminating to be meaningful.

First, a union constitution is the members' own ordering of their associational relationship. Acting in convention, by referenda, or at union meetings the members democratically determine for themselves how their union shall function to achieve their common end. They have no reason to adopt any rules which are antagonistic to their mutual interest as members. An employee who enters a union becomes therefore a member of a society run by rules congenial to every member's welfare. There is thus no basis for viewing those rules with a hostile eye on the assumption that they are fashioned with a bias adverse to the member. Second, there is no possible way that a worker aspiring to membership can negotiate with a union for a set of rules which suits him personally. This is not due to unequal bargaining power. It stems rather from the inherent communal necessity that the rules shall blanket the entirety of the membership evenhandedly without special exception for any. Third, the union constitution as it exists when the new member joins is not a closed instrument. The new member on an equal footing with the old members has the right to seek to change the existing rules through the democratic channels open to all.

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To call a union constitution a contract of adhesion s therefore terrifyingly inapt. A union constitution as about the same resemblance to an insurance policy s a labor organization has to an insurance company.

(d) But even if it were appropriate to characterize a nion constitution as a contract of adhesion, it does not ollow that a rule against strikebreaking may not ightly be interpreted to bar a postresignation return o work.

(*i*) The Board on brief would have it that implica- ion is forbidden in the interpretation of an adhesion ontract (Bd. br. pp. 11-12). This is a vast over- tatement. The conventional formulation is that, after ll other processes of interpretation have been ex- austed without resolving the meaning of the instru- ent, "the court will adopt that one which is the less avorable in its legal effect to the party who chose the ords." 3 Corbin, Contracts, § 559, p. 262; see also, d. p. 268. It is one of a number of "*secondary* rules" iding interpretation to be invoked if meaning cannot e satisfactorily ascertained through the primary outes. Restatement, Contracts, § 236(d) and Com- ent on Clause (d).

But the Board on brief would convert a secondary nterpretative aid into the dominant determinant of eaning. It would bar a just and reasonable inter- retation, not because that interpretation is not the ir import of the union rule, but just because its eaning was arrived at by implication. No such arren canon exists for the interpretation of any in- rument.

Furthermore, it makes no sense to say of a union con- itution that doubt as to its meaning is to be "resolved

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against the party who drafted the terms" (Bd. br. p. 11). The drafters of the constitution are the members themselves operating through the democratic channels they have formed to give practical effect to their communal wishes. Why should an interpretation of their constitution be preferred which operates more strongly against them? More particularly, why should a rule against strikebreaking be interpreted in favor of the strikebreaker rather than the striker? It is a measure of the sterility of the invocation of a secondary aid to interpretation that the Board on brief does not even bother to ask, much less answer, these questions.

(*ii*) Another consequence of characterizing an instrument as a contract of adhesion is a candid refusal to give effect to a term found to be "unconscionable" or "unreasonable" 3 Corbin, Contracts, § 559, pp. 270-271. We welcome the application of that test. The entire burden of our argument is that it is fair and reasonable to interpret a prohibition against strikebreaking to bar a postresignation return to work. And the Board on brief does not say otherwise. It does not choose to fight on this field.

(*iii*) The sharp dichotomy that the Board on brief would draw between an express term and an implied term does not in truth exist. "Implied Promises are also Express Promises, Found by Process of Interpretation." 3 Corbin, Contracts, § 562, p. 286. An express promise often requires interpretation to ascertain its import. An implied promise may be as commanding in its clarity as any which is express. "An implied promise . . . is . . . a promise implied in fact, a promise that the promisor himself made, but a promise that he did not put into promissory words with sufficient

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clearness to be called an 'express promise.' When a court finds and enforces a promise such as this, it finds it by interpretation of the promisor's words and conduct in the light of the surrounding circumstances. This is the exact process by which the meaning of any contract is determined, whether it be described as an express contract or an implied contract. It is the same whether the contractor expressed his intentions in the form of words, oral or written, or expressed them by conduct wholly non-verbal, or used both forms of expression together. The meaning of his words and acts is found by relating them to the usages of the past; this is interpretation." *Id.*, § 562, pp. 286-288.

(d) The fundamental fallacy of the Board's approach on brief is exposed by its effort to distinguish this Court's decision in *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233 (1971) (Bd. Br. pp. 12-13). This Court in *Hardeman* repudiated a narrow reading of a union constitution, requiring instead that it be interpreted responsively to its character as a charter of union government, with deference due to the union's own reasonable and fair construction of its rules (our brief pp. 70-71, 82).

But, says the Board on brief (pp. 12-13), *Hardeman* is confined to the Labor-Management Reporting and Disclosure Act, "does not enunciate a general principle that is applicable to other statutes as well", dealt with the statutorily unprotected activity of assaulting a union official, and does not cabin the Board where the interpretation of a union constitution is relevant to the reach of the National Labor Relations Act. The Board's attempt to carve a special niche for itself is sleeveless. The nature of a union constitution as a charter of government does not change just because

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the Board arrives on the scene. The Board has the same obligation as any other trier to honor a fair and reasonable interpretation. Nor is a simplistic rejection of recourse to implication in reading a union constitution any wiser when the Board asserts it. *Hardeman* rejected the dogma that " 'penal provisions in union constitutions must be strictly construed' " (401 U.S. at 242). That dogma does not become any more acceptable when the Board on brief enunciates an indistinguishable version by which it would confine a union constitution to its narrowest literal reading unaided by the ordinary process of implication.

The Board's attempted distinction on brief of *Hardeman* is indeed foreclosed by this Court's decision in *Allis-Chalmers*. The Court in *Allis-Chalmers* upheld the imposition of a court-collectible fine against a member for engaging in strikebreaking. But there was in that case no rule against strikebreaking as such. Guilt was based rather on " 'conduct unbecoming a Union member' " (388 U.S. at 177).[6] The union rule prohibiting "conduct unbecoming a Union member" was given specific content by interpreting it to bar strikebreaking. The rule on its face utterly lacks explicitness and depends on implication for its content. It can acquire meaning only as situations within and without its scope are spelled out in actual application. It was reasonably and fairly interpreted to forbid

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[6] See, also, *Local 248, United Automobile Workers* v. *Natzke*, 36 Wis. 2d 237, 240, 153 N.W. 2d 602, 604 (1967), the state court counterpart to the *Allis Chalmers* unfair labor practice proceeding, identifying the offense with which the member was charged as "conduct unbecoming a member for having gone back to work during the strike." Accord, *Local 248, United Automobile Workers (Allis Chalmers)*, 149 NLRB 67, 75-76 (1964), affirmed, 388 U.S. 175 (1967).

strikebreaking because of the indispensability of strike solidarity in waging economic warfare. And it was an interpretation in an area of activity which involves the National Labor Relations Act.

There is, accordingly, no principled basis for distinguishing *Allis-Chalmers* from this case in terms of the use of implication to define a union rule. In *Allis-Chalmers* a general rule prohibiting conduct unbecoming a member was interpreted to bar strikebreaking. Here an explicit rule prohibiting strikebreaking is interpreted to bar a postresignation return to work. Given the use of implication in both cases, and the area of the National Labor Relations Act in which that use operates in the one case no less than in the other, *Hardeman* can be distinguished from this case only by repudiating *Allis-Chalmers*.

But *Hardeman* and *Allis-Chalmers* are both good law. Both are responsive to careful congressional concern " 'neither to undermine self-government within the labor movement nor to weaken unions in their role as bargaining representatives of employees.' " *Hodgson* v. *Local Union 6799, Steelworkers*, 403 U.S. 333, 338-339 (1971). Each respects the objective to "preserve and strengthen unions as self-regulating institutions . . . ." *Id.* at 339. In this case, interpreting its own charter of government, the Union as a self-governing institution fairly and reasonably concluded that its rule against strikebreaking barred a postresignation return to work. The statutory question which that interpretation presents is whether a ban on postresignation strikebreaking is valid under the National Labor Relations Act. It is that question which should be decided. The Board on brief, to avoid that question of statutory construction, would hobble a union with

artificial restrictions on the interpretation of its constitution. But the question of the interpretation of the constitution is perfectly straightforward and should be straightforwardly answered without mutilating narrowness. And given the interpretation that postresignation strikebreaking is barred, the statutory question which that interpretation presents is also perfectly straightforward and the Board should stop trying to avoid a straightforward answer to it.

3. *Validity of the rule:* Boeing argues that a ban of postresignation strikebreaking is invalid on the ground that "it would, as a practical matter, deprive [an] employee-member . . . of the right to resign from the Union at any time, because (a) . . . [it] binds him to the union rules *during* a strike and (b) he is bound to membership during the life of the contract" (br. p. 29). The argument is factually flawed. An agreement cannot bind an employee to full membership; it can only obligate the employee to pay union dues and an initiation fee. The employee need not assume any other obligation of union membership. If he becomes a full member, assuming all other obligations of union membership, it is not by compulsion of the agreement but by his own election that he takes that step. And he is still free after choosing full membership to revert to the status of a limited member during the term of the agreement. Indeed, under the provisions of the IAMAW's 1972 amendment of its constitution explicitly banning postresignation strikebreaking (our brief p. 58), he may even shed the obligation to refrain from strikebreaking if he resigns his full membership more than 14 days preceding the commencement of the strike. Following the expiration of the agreement, a full member is free to sever all relations with the Union, save

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only that he must observe his preexisting obligation to refrain from strikebreaking for the duration of a current strike. His union obligations in every other respect are at an end. In short, an employee need never become a full member; he may revert to the status of a limited member at any time; and the sole restriction under the IAMAW constitution is that he must effectuate the reversion more than 14 days before a strike begins if he wishes to disavow his obligation to refrain from strikebreaking in the current dispute. This is little enough.

II. THE REASONABLENESS-OF-FINE ISSUE

1. In its brief, in addition to its assertion that the fine is excessive in amount, Boeing suggests that its imposition is arbitrary for an array of other reasons (br. pp. 7-8, 34-35, 45-47). In the Court of Appeals, Boeing made this argument in greater detail, and we include as an appendix to this brief the response we made in that court to the particularities of its claim of arbitrariness (*infra,* pp. 1a-16a).

Since the power of the Board to entertain the merits of the claim is the presently relevant point, it is pertinent to observe that Boeing would sweep the entirety of the administration of union discipline within the Board's purview. For it looks to the Board to consider not only the amount of the fine, but also the "method . . . and . . . time" of its payment, "as well as the manner in which the charges were filed and processed which led to the imposition of the fine or penalty" (br. p. 46). It seeks also an assessment of "other sanctions or punishments" imposed additional to the fine (*ibid.*). And it would inquire into "whether the employees were informed in advance" of the rule, "and

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whether they were warned in advance that they would be penalized and to what extent or degree" (*ibid.*).

This is indeed a "multiplicity of factors" (*ibid.*) and it tellingly illustrates that this maelstrom is no part of the Board's authorized business. Furthermore, it is Boeing that complains that the members have been fined in an excessive amount and by arbitrary means. The employer is surely an unlikely private attorney general to assert the member's interest in a union-member controversy centered upon a claim of arbitrary administration of internal union discipline.

2. Boeing cites and quotes from the Board's decision in *Carpenters Local Union No. 22 (Graziano Construction Co.)*, 195 NLRB No. 5, 79 LRRM 1194 (1972), to support its view that review of internal union discipline is within the Board's proper purview (br. pp. 19, 41, 43, 44, 45). But the Board in that case held only that the particular union rule there at issue was invalid because in application it abridged rights conferred by the Labor-Management Reporting and Disclosure Act. It confined itself to determining the validity of the application of the rule by reference to external statutory criteria. It made no incursion into a union's internal affairs to ascertain whether a valid rule had been arbitrarily administered because the fine was excessive, the notice insufficient, the hearing inadequate, or like defects. What Boeing would have the Board do in this case is to cross from external substantive validity into internal union administration. The Board took no such step in *Carpenters Local Union No. 22.*

We cannot, however, forbear expressing our skepticism of the soundness of the step that the Board did

take. It invalidated application of a rule because it offended the LMRDA. But enforcement of the LMRDA is no part of its business. Other agencies and tribunals are commissioned to perform that task. The Board has committed the same error for which this Court rebuked it when it invalidated a so-called "hot cargo" provision of a collective bargaining agreement because it was said to violate the Interstate Commerce Act although the administration of that statute is entrusted to the Interstate Commerce Commission. *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 108-111 (1958). The Board should stick to its own last.

Respectfully submitted,

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APPENDIX

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APPENDIX

The following is a verbatim reproduction of pages 21-36 of the Union's reply brief before the Court of Appeals addressed to the particularities of Boeing's claim in that court that the fines levied by the Union were excessive in amount and otherwise arbitrarily imposed. The record references have been renumbered to correspond with the pagination of the Appendix in this Court, and the cross-references to unprinted parts of the Union's opening and reply briefs in the Court of Appeals have been deleted.

2. The Particular Factors Said To Show That The Fines Were Unreasonably Large In Amount.

We now turn to consider the particular factors said to show that the fines were unreasonably large in amount.

(a) It is said that the fines were excessive because the strikebreakers were "required to pay amounts exceeding their earnings . . ." (Co. br. p. 14). The premise of this argument is that a fine is *ipso facto* unreasonable if it is larger than the gain which the wrongdoer realized from working during the strike in violation of his duty to refrain from strikebreaking.

The argument is irrelevant to those strikebreakers who, having appeared for trial, apologized, and pledged loyalty to the Union, were fined fifty percent of their strikebreaking earnings. Any concept of gearing the size of the fine to the amount of the earnings is surely satisfied by levying the penalty at one-half of the wrongful gain. For if the criterion is the sum that the strikebreaker earned in violation of the rule, it is clearly rational to divest the rule-breaker of the entirety of the sum—not merely one-half—that he made by reason of his breach. His fellows who did not work during the strike sustained the identical loss; they

sacrificed their pay from the struck employer. There is no reason why the strikebreaker should be in a better monetary position than the striker. In short, if measuring the fine in relationship to earnings is the sole valid criterion, it would hardly be unreasonable were a union to assess the penalty at the entirety of the sum earned in violation of the rule. The fine would do no more than equalize the financial sacrifice of the strikebreaker and the striker. In this case, therefore, levying the fine at one-half of strikebreaking earnings in consideration of the strikebreaker's repentence and pledge of future loyalty is well within any notion of reasonableness.

The Company's excess-of-earnings argument, therefore, is grounded in solicitude for the unrepentant strikebreaker who did not appear for trial and who remains unregenerate. It is that strikebreaker, the Company contends, who cannot reasonably be fined a flat sum of $450. Why? What ineluctable moral imperative commands fixing the upper limit of a strikebreaker's fine to the maximum strikebreaking pay that he earned during the period of his violation? A fine is punishment. It is traditionally assessable at a sum greater than the monetary benefit that the wrongdoer derives from his offense. An antitrust violator pays treble damages (*Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100, 113 (1969)); a Fair Labor Standards Act violator pays twice the unpaid minimum wages or the unpaid overtime compensation (Fair Labor Standards Act, § 16(b), 29 U.S.C. § 216); a tortfeasor or contract violator whose offense is considered egregious pays punitive damages (*U.A.W.* v. *Russell*, 356 U.S. 634, 646 (1958)); a thief who steals less than $100 may be fined $200, in addition to being ordered to make restitution. D.C. Code, § 22-2202 (1967). In short, since a fine is punishment, there is nothing in principle which limits a fair fine to the member's monetary gain from his rule-violation. Whether it should be more, less, or the same is a matter for the union's own independent determination as part of its autonomous right of self-government.

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Once shown that a fine need not be limited in its maximum size to strikebreaking earnings, there is nothing to suggest that the $450 fine in this case is excessive in amount. In *Scofield*, the Supreme Court stated that it "essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) . . . holding that a union could fine a member for his failure to take part in picketing during a strike . . ." (394 U.S. at 428). In *Minneapolis Star* the Board found that "the imposition of a $500 fine on Carpenter by the . . . Union is not violative of Section 8(b)(1)(A) of the Act." 109 NLRB at 729. By approving reference to *Minneapolis Star* the Supreme Court did not blink at a $500 fine. By what logic is a $500 fine for failure to perform picketing duty acceptable but a $450 fine for strikebreaking unreasonable, particularly since failure to perform picketing duty results in no strikebreaking earnings at all in contrast to the financial gain entailed in working for the struck employer? Indeed, as *Minneapolis Star* illustrates, there are many union offenses which do not involve financial gain for the violator, so that the size of the fine for the offense is often simply not measurable in terms of a violator's monetary profit from his wrong. There is no reason, accordingly, why a fine for strikebreaking should be implacably related to earnings derived from the wrong when a fine for other offenses is not.

(b) It is said that, as the "normal financial obligation of a member of the Union is discharged" by payment of "dues of $5.50 per month or $66.00 per year," a $450 fine for strikebreaking is unreasonable as "a major escalation in financial obligation" (A. 21). If ever there were a comparison of incommensurables, this is it. Dues and initiation fees are the contribution of each member to the sum necessary to operate a union. A fine is a penalty imposed for violation of a rule. One has nothing to do with the other in the amount required to fulfill the relevant purpose. One may agree that a member does not expect to pay $450

as his contribution to defraying the expense of running a union. That is very far from saying that it is not a penalty fairly contemplated for violating a basic institutional obligation to refrain from strikebreaking. Surely this distinction is within the reasonable range of the Union's self-governing discretion.

(c) It is said that the fine was unreasonable considering "the fact that employees in the New Orleans area had been subjected to the devastating effects of Hurricane Betsy a week before the strike began" (Co. br. p. 16). But this act of God did not distinguish between the striker and the strikebreaker. Both strikers and strikebreakers were alike the victims of the hurricane; both endured the same privation it inflicted. By what standard of reasonableness should the Union be expected to extend compassion to the strikebreaker who abandoned the strike in order to escape the identical distress that the steadfast striker equally suffered?

(d) It is said that the fine is unreasonable considering, if suit is instituted against the strikebreaker to collect it, "the time lost from work in defense of the civil court action and his respective attorney's fees and court costs" (Co. br. p. 15). Since the Company has undertaken the defense of the collection suits against the strikebreakers (A. 7; 77, 99-100, 109), in this case at least the Company is pleading its own litigation costs rather than the strikebreakers'. Passing that, the plea is wide of the mark. When the Supreme Court decided in *Allis-Chalmers* that a fine could validly be collected by court action, it surely did not mean an action in which the strikebreaker incurred no expense as a defendant. A reasonable fine does not become an unreasonable fine because of the cost to a strikebreaker in resisting the payment of it. For a strikebreaker, no less than for the rest of the community, "the expense and annoyance of litigation is 'part of the social burden of living under government.'" *Petroleum Exploration* v. *Public Service Commission*, 304 U.S. 209, 222 (1938).

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(e) Heavy stress is placed on the circumstance that in one collection action instituted by the Union—and the evidence shows only that one (A. 135, Tr. 48)—the Union in its petition sought attorneys' fees of $180 (Co. br. pp. 13, 14). If Louisiana allows attorneys' fees in that or any amount, the quarrel is with Louisiana law, not with the reasonableness of the fine. If Louisiana does not allow attorneys' fees in that or any amount, the quarrel is with an overstated request for relief—not a novelty in litigation—and again not with the reasonableness of the fine.

(f) We conclude with consideration of the standard of reasonableness innovated by the examiner. According to him, "a fine of 35 percent or less of a strikebreaker's earnings at his regular rate of pay" and of "80 percent or less of overtime or premium pay" is in totality "presumptively, a reasonable fine" (A. 30). Every party to the proceeding before the Board—the General Counsel (A. 48), the Company (A. 53), and the Union (Exc. 34, 36, 37, not reprinted in the Appendix)—expressed its dissatisfaction with this formula. It is a Procrustean solution, drawn from thin air, utterly alien to the way in which any union tribunal has ever determined what a proper fine should be, and wholly foreign to the way in which any judge has ever considered whether or not a fine was reasonable.

The examiner premises his formula on the proposition that a "reasonable fine" must be "less than a total deterrent to working during a strike"; as he sees it, a fine in an amount that operates as "total deterrence" to strikebreaking is unreasonable (A. 27). This premise is quite inexplicable. If the object of a fine is to secure observance of a rule by penalizing violation of it, it passes understanding why the fine should be fixed at a level which tempts violation by leaving a margin for profitable infraction. The examiner compounds the incomprehensible by his further assertion that a "total deterrent" interferes with an employer's "right to protect and carry on his business" dur-

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ing a strike by blocking effective recruitment of a work force from among the strikers (A. 28)! We had supposed that it could at least be taken for granted that, whatever an employer's "right" to try to operate during a strike, it was surely not a union's duty to cooperate with him by enforcing less than total observance of a rule against strikebreaking.

The examiner's tour de force demonstrates the incompatibility between NLRB inquiry into reasonableness and the statutory bar against NLRB regulation of a union's internal affairs. The infelicity of the examiner's solution suggests that he and his colleagues, well-enough versed in dealing with the NLRB's staple business, do not have the aptitude or experience requisite to the task of regulating union self-government, an area outside the sphere of their conventional concern. More fundamentally, whatever the level of competence that would be brought to bear, there can be no NLRB determination of reasonableness which does not impose upon the union the agency's judgment of how union discipline should be administered. That regulation of a union's internal affairs is simply no part of the statutory design of the National Labor Relations Act or of the job that Congress commissioned the Board to perform.

II.

THE COMPANY'S ADDITIONAL CLAIMS OF ARBITRARINESS BY THE UNION, OTHER THAN THE ALLEGED UNREASONABLENESS OF THE SIZE OF THE FINE, WERE NOT URGED BY THE GENERAL COUNSEL; THEIR ADVANCEMENT IS THEREFORE PROCEDURALLY BARRED, BESIDES BEING DEVOID OF SUBSTANTIVE WORTH.

Aside from the alleged unreasonableness of the fine, the Company urges that the Union acted arbitrarily in other respects. These additional claims of arbitrariness were not advanced by the NLRB General Counsel. We therefore consider them separately because, aside from their lack

of substantive worth, the Company is procedurally barred from presenting them in view of the General Counsel's refusal to tender them to the Board.

A. Procedural Bar

By urging claims of arbitrariness not advanced by the General Counsel the Company seeks to enlarge upon the complaint that the General Counsel issued and litigated. This is especially evident in that the General Counsel and the Union stipulated, but the Company did not, that there was no issue concerning the regularity and fairness of the internal union proceeding eventuating in the imposition of the fines (A. 80-81, 118-119).

Section 3(d) of the Act bars the Company's attempt to enlarge the issues tendered by the General Counsel. That section provides that the General Counsel "shall have final authority . . . in respect of the . . . issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board . . . ." In obedience to this command, it is the Board's settled interpretation that "the decision whether to issue a complaint, the contents of the complaint, and the management of the prosecution before the Board is entrusted to the sole discretion of the General Counsel . . . . It follows that only the General Counsel may move to amend a complaint to allege an additional violation of the Act. Otherwise the management of the cause would *pro tanto* be taken from the General Counsel and entrusted to a private party, which is contrary to the scheme of the statute and the specific provision of Section 3(d)."[20] This Court, as others, has uniformly ap-

[20] *Sailors' Union of the Pacific*, 92 NLRB 547, n. 1 (1950). See also, *Local 1012, UE (General Electric Co.)* 187 NLRB No. 46, sl. op. p. 4, n. 2, p. 5, n. 10, 76 LRRM 1038 (1970); *Sunbeam Plastics Corp.*, 144 NLRB 1010, 1011, n. 1 (1963); *Dallas Concrete Co.*, 102 NLRB 1292, 1296-97 (1953); *Crowley's Milk Co.*, 88 NLRB, 1049, 1073 (1950); *Times Square Stores Corp.*, 79 NLRB 361, 365 (1948).

proved the construction that the Board "lacks power to allow amendment of a complaint without consent of the general counsel." [21]

Furthermore, even were there power to adjudicate claims at the instance of a private party which the General Counsel does not allege, there is an insuperable procedural due process objection to their entertainment in this case. For there has been no adequate notice that the claims were at issue, nor any fair opportunity to defend against them. It is elementary that "the Board may not make findings of fact and order related remedies on issues not charged in its complaint or litigated in the subsequent hearing," particularly where the notice that a respondent has been given by the General Counsel is that the claim is *not* in issue.[22]

Accordingly, the Company is foreclosed from presenting the additional claims it seeks to tender, both because it would circumvent the General Counsel's final authority over the issuance, scope, and prosecution of the complaint, and because of the fundamental unfairness of confronting a party with a claim of which it had no adequate notice and against which it had no sufficient opportunity to be heard in defense.

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[21] *International Union of Electrical Workers* v. *N.L.R.B.*, 110 U.S. App. D.C. 91, 289 F.2d 757, 761-762 (1960). See also, *Steelworkers* v. *N.L.R.B.*, 129 U.S. App. 260, 263, 393 F.2d 661, 664 (1968); *National Maritime Union* v. *N.L.R.B.*, 423 F.2d 625, 626 (C.A. 2 1970); *Wellington Mills Division, West Point Mfg. Co.* v. *N.L.R.B.*, 330 F.2d 579, 590-591 (C.A. 4 1964), cert. denied, 379 U.S. 882 (1964); *Piasecki Aircraft Corp.* v. *N.L.R.B.*, 280 F.2d 575, 588 (C.A. 3 1960), cert. denied, 364 U.S. 933 (1961); *N.L.R.B.* v. *Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (C.A. 5 1955).

[22] *General Teamsters Local 992* v. *N.L.R.B.*, ——U.S. App. D.C. ——, 427 F.2d 582, 588 (1970). See also, *Rodale Press* v. *F.T.C.*, 132 U.S. App. D.C. 317, 320-322, 407 F.2d 1252, 1256 (1968); *S.S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225, 1234-1235 (C.A. 6 1969).

B. Substantive Merits

The procedural bar aside, consideration of the merits of the Company's claims of arbitrariness shows that nothing would be left of the design of the proviso to exclude a union's internal affairs from NLRB oversight were those claims thought to present issues cognizable under section 8(b)(1)(A) of the Act.

1. The Company complains that "neither before nor during the strike did the Union warn employees that fines or any other action would be taken against those who worked during the strike" (Co. br. pp. 12-13). But the IAMAW Constitution explicitly defines misconduct of a member to include "Accepting employment in any capacity in an establishment where a strike . . . exists as recognized under this Constitution, without permission" (A. 5; 143). And the Constitution is no less explicit that commission of this offense, like others, shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (Pet. 36a, A. 5; 142). There was, therefore, ample forewarning. Moreover, it beggars belief that any union member, or any person living in today's industrial society, can fail to know that strikebreaking is a cardinal union offense. This record shows actual knowledge (A. 60-61, 69-70, 73-74). There is thus an explicit written rule and ample evidence that the standard of conduct it requires was known. This is more than enough. *International Brotherhood of Boilermakers* v. *Hardeman*, 39 U.S.L.W. 4275, 4278-79 (S. Ct. Feb. 24, 1971). It is therefore unnecessary to invoke the view that "where a member's act is clearly in derogation of an obvious group interest, either because the group's dedication to particular ideas or goals is clear or because the member's act is especially hostile to more general group interests, the association could properly expel un-

der a very vaguely worded rule, or indeed without any rule."[23] Nor is it necessary to remind that the "rule that 'ignorance of the law will not excuse' . . . is deep in our law . . . ."[24]

This answers the Company's insistence that the IAMAW constitutional "provisions had not been effectively communicated to the employees" (Co. br. p. 14). We add the NLRB General Counsel's own refutation of the Company's claim made in his brief to the Board (p. 5):

> Members may reasonably be expected to be aware of the duty of loyalty, even absent general provisions therefor commonly found in union constitutions . . . . Moreover, it would be manifestly unfair to require a union to warn its members about conduct in which they have not yet engaged and which the union could not reasonably be expected to anticipate. Indeed, where the amount of the fine turns out unreasonable, the warning could be interpreted as a threat which itself may constitute a violation of Section 8(b)(1)(A).

A final variant is the Company's assertion that "[n]o consideration was given" to "whether or not . . . [an individual] knew he was in violation of the Union's rules" (Co. br. pp. 15, 26). The short answer to this plea in mitigation is that there is no sufficient evidence of individual ignorance. Those who did not appear for trial can hardly complain that they did not receive the benefit of a plea that they did not make. Those who appeared for trial, apologized, and pledged loyalty to the Union received the benefit of a reduced fine of fifty percent of strikebreaking earnings. Finally, whether an individual plea of ignorance if made should be believed, and the effect to be given to it if credited, are surely matters within a union's self-

[23] Note, *Developments in the Law, Judicial Control of Actions of Private Associations*, 76 Harv. L. Rev. 985, 1018 (1963).

[24] *Lambert* v. *California*, 355 U.S. 225, 228 (1957).

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verning discretion. A plea of "individual circumstances" (Co. br. p. 15) cannot be, as the Company would have it, e subject of a mass claim unrelated to a particular per-n; it must be a pinpointed personalized inquiry directed a specific individual, a course the Company does not take d for which the record would be quite inadequate.

2. The Company asserts that "Fines had never been vied on members of the Union before for any reason" (Co. br. p. 13). But the Union had been in being only about o years when the strike took place (Pet. 35a, n. 1, A. 4; -79), so that it did not have a long history. It was em-wered by the IAMAW Constitution to levy fines, and ere is utterly no basis for an implied claim that the power d evaporated by desuetude.

3. The Company complains that "trials were held even the employee did not appear" (Co. br. p. 13). The AMAW Constitution provides (A. 145), and each accused s informed that (Pet. 36a, A. 5; 163), "if you fail to pear when notified, the trial shall proceed as though the ember were in fact present." Accordingly, each accused s afforded the opportunity to be present, and an ac-sed's failure to appear was his own voluntary act. "The ght to be present may be waived by a party or his counsel voluntary absence from the courtroom at a time when it known that proceedings are being conducted or are about take place, and in that event the trial may proceed . . ."[25] Section 101(a)(5) of the LMRDA provides that member may be disciplined unless "afforded a full and r hearing", but this obviously does not mean that an used may defeat the administration of discipline by luntarily absenting himself from the hearing which is orded him.

4. The Company complains that "[t]here is no evidence t anyone was found not guilty" (Co. br. p. 13). This

[25] 5 Moore's Federal Practice ¶ 39.14, p. 748 (2d ed. 1969).

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is erroneous in fact and irrelevant in law. The record shows a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "mistrial" without retrial as to a fourth (A. 174, 81-82, 126). In any event, if all accused are guilty there is no reason why any should be found innocent.

5. The Company complains that there "was no notification to employees by the Union that it had reduced or would reduce the fines under some circumstances" (Co. br. p. 13). The accused employees would have known of the availability of reduced fines for repentant strikebreakers had they appeared for trial or at the ensuing union meeting at which their penalty was determined. Any ignorance by the employees—if indeed they were ignorant—resulted from their own failure to participate in the proceedings, and is their own fault for which they have no one to blame but themselves.

6. The Company complains that the "notification to the employees of the charge against them did not advise them of the penalties which might be imposed upon them" (Co. br. p. 13). Section 101(a)(5) of the LMRDA provides that a member be "served with written specific charges." This requires that the elements of the alleged offense be set forth, but it does not require a statement of the potential range of discipline in the event that guilt is found. The object of a charge is to give "an accused member . . . sufficient notice to enable him to prepare his defense,"[26] and fulfillment of this object does not require apprisal of the potential penalty in the charge itself.

7. The Company complains that the "amount of $450.00 was determined before any of the hearings or trials were held . . ." (Co. br. p. 15). All that the record suggests is that the officers of the Union recommended the size of the

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[26] Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049, 1079 (1951).

fine to the trial committees (A. 123). But there is nothing to show that each trial committee did not, as required by the IAMAW Constitution, retain full power to "consider and agree upon its recommendation of punishment," and that the members at the ensuing union meeting to consider the recommendation did not retain full power to decide what the punishment should be (A. 146-147). And that the power was in fact exercised is shown by the fifty-percent-of-strikebreaking-earnings fine assessed against the repentant strikebreakers.

8. According to the Company, a "request was made to the Company by the Union that certain of the fined employees be discharged, and it waited until January 8, 1968, to withdraw the request" (Co. br. p. 14). The Company's thought must be that the Union attempted job discrimination, and that an otherwise unobjectionable fine becomes tainted with illegality if job discrimination is attempted at the same time.

The claim is baseless. The paradigmatic situation existed in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954). There the Board remedied the discriminatory deprivation of work sustained by the employee (*id.* at 728), but declined to interfere with the fine imposed upon him for violation of the union rule (*id.* at 729). The Supreme Court in *Scofield* approved *Minneapolis Star* in terms, observing that it "essentially accepted the position" of the Board exemplified by *Minneapolis Star* "where the Board . . . distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of §§ 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)." 394 U.S. at 428.

Accordingly, assuming that the Union attempted job discrimination in this case, it has nothing to do with the con-

tinuing vitality of the Union's independent right to fine for strikebreaking and to collect the fine by means other than job discrimination.

9. The Company complains that the Union in its newspaper castigated the strikebreakers (Co. br. pp. 15-16). Strikebreaking is not an endearing activity and the expression of resentment against it is the exercise of freedom of speech.

10. The Company contends that the Union could not fine even those members who did *not* resign from the Union. The basis of this contention is the claim that "some or all" of the strikebreakers who "did not resign" failed to do so "because they were told they could not do so or were not aware that they could do so" (Co. br. pp. 18-19). Accordingly, the argument runs, their membership was "involuntary," and an "involuntary" member is not subject to union discipline (Co. br. pp. 18-19, 26-27).

The Company first advanced this theory to the Board in a "supplemental and reply brief" served May 2, 1969, four months after the trial examiner's decision issued. This is too late. The "time for giving notice of the matters of fact and law asserted is prior to the hearing, not in . . . [a] 'post-complaint theory of the case' unveiled in a post-hearing brief."[27]

On its merits, the claim of "involuntary" membership is singularly untenable. Under the terms of the union security agreement between the Company and the Union (A. 154-158), no employee who is not a member of the Union need join the Union, so that all employees who did become members did so because they wanted union membership. Furthermore, even if it could be said that membership was

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[27] *N.L.R.B.* v. *Majestic Weaving Co.*, 355 F.2d 854, 861 (C.A. 2, 1966); *Boyle's Famous Corned Beef Co.* v. *N.L.R.B.*, 400 F.2d 154, 164-165 (C.A. 8, 1968); *S.S. Kresge Co.* v. *N.L.R.B.*, 416 F.2d 1225, 1234-1235 (C.A. 6, 1969).

constrained, the Supreme Court in *Allis-Chalmers* ruled that, so long as an individual was a full member, regardless of the reason for his status, he was subject to union discipline to require his observance of union rules. The Court explained that (388 U.S. at 196):

> The majority *en banc* below nevertheless regarded full membership to be "the result not of individual voluntary choice but of the insertion of [this] union security provision in the contract under which a substantial minority of the employees may have been forced into membership." 358 F.2d, at 660. But the relevant inquiry is not what motivated a member's full membership but whether the Taft-Hartley amendments prohibited disciplinary measures against a full member who crossed the union's picket line. It is clear that the fined employees involved in these cases enjoyed full union membership. . . . Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary.

The Company seeks to finesse the *Allis-Chalmers* ruling by arguing in effect that, even though it does not matter whether or not membership was initially compelled, the member must have and be told that he has a wholly unconstrained opportunity to resign at will at any time. At this point the Company's position and the Union's position are in full collision. For it is the Union's position that, whatever right to resign that a member has and exercises, a mid-strike resignation does not free a member from his existing obligation to refrain from strikebreaking for the duration of the current controversy.

Finally, even were the Company's legal position tenable, there is no factual predicate for its assertion. The record shows—the evidence having come in on another issue—that any member who wanted to resign knew that he could and how to go about it. The examiner found that "in the past,

in 1963," the Company "believed and so advised personnel when such matters arose, that, in a no-contract period, an employee, who wished to resign from the Union and to discontinue authorization for check off of dues, could do so by writing to the Company and to" the Union (A. 8; 92, 107), and "the Company had no reason to believe that its understanding of the procedure was disputed" (A. 8). Based on its understanding, the Company during the current controversy advised its labor relations personnel that, if they were asked by union members about resignation, they should tell the member that "in the past, the procedure has been to send a registered or certified letter to the Union and to the Company . . . stating he wishes to terminate his membership in the Union and to cancel his payroll authorization for Union dues deductions" (A. 9; 90-92, 187, 102-103). Supervisors and other management people did tell members that resignation could be effected by writing to the Union and the Company (A. 9-10; 104, 68-69, 73, 116, 129). As one witness stated, "It was general all over the plant that you . . . just had to send the letters . . . " (A. 68). And 119 members did resign (Pet. 35a), a number which graphically confirms ample knowledge that resignation could be effected. Accordingly, there is simply no factual basis for the Company's assertion that strikebreakers who did not resign failed to do so "because they were told they could not do so or were not aware that they could do so" (Co. br. pp. 18-19).

In sum, we have explored the merits of the Company's claims of arbitrariness, not because their decision is properly the office of this proceeding, but to show by their character that they are simply not the business of the Board. Review of the administration of union discipline to enforce a valid rule is a field foreign to the Board.